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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 374

JAMES A. TOTTEN,
d/b/a TOTTEN AND DUNN COMPANY,
Petitioner,

v.

LOCAL 43 OF UNITED ASSOCIATION
OF JOURNEYMEN AND APPRENTICES
OF THE PLUMBING AND PIPE FITTING
INDUSTRY OF THE UNITED STATES
AND CANADA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on May 9, 1968

OPINIONS BELOW

The opinion of the District Court filed December 13, 1966 (Appendix, page 18), is unreported. The order of the Court of Appeals for the Sixth Circuit (no opinion filed) is located in the Appendix at page 25.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit was entered on May 9, 1968. The jurisdiction of this Court is invoked under 28 USC, § 1254(1).

QUESTION PRESENTED

Does a federal court ever have jurisdiction to determine whether an alleged arbitration ruling is legally or factually correct?

STATUTES INVOLVED

Section 301(a) [29 U.S.C. 185(a)] of the Labor-Management Relations Act reads:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

On June 22, 1966, or shortly thereafter, your petitioner, who was party to a contract with the respondent, received a letter from the respondent stating "your contract is can-

celled." The reason given was that Totton (the Petitioner) was "working people who are not furnished by the Local." The last paragraph of this letter (page 12 of the Appendix) reads:

> "Under the agreement you have the right to appeal to the Joint Conference Board (Section 21) within 10 days in writing."

Totton appealed to the Joint Conference Board, which Board on June 30, 1966, affirmed the cancellation of the contract. (See letter from the Joint Conference Board, page 17, Appendix.) This suit was filed on July 1, 1966 (Appendix, page 7), asking that the Court declare the rights of the parties, and in particular that the Court determine whether Totton was required by the contract to hire only men furnished by the Union (respondent), *even after the Union refused to furnish men to Totton*. Jurisdiction was invoked under Section 301(a), Labor Management Relations Act.

The Union replied (Appendix, page 14), that the "plaintiff elected the Joint Conference Board, the arbitration tribunal chosen by the parties, to act upon the matter," and then claimed that the action of the Joint Conference Board was res judicata.

The Union filed a motion for summary judgment (Appendix, page 15), based upon the allegation that the hearing before the Joint Conference Board was in fact an arbitration, and therefore was final and binding, and the plaintiff had no recourse to Court review. Totton contended that the submission to the Joint Conference Board was an appeal, and amounted only to an exhaustion of an administrative remedy.

The District Court in its opinion (Appendix, page 20) quoted Article XXI from the contract, held that the sub-

mission to the Joint Conference Board was an arbitration, and granted a summary judgment in favor of the Union.

ARGUMENT

Two questions are raised in this petition: First, whether the finding of an arbitrator (or arbitration board) is reviewable by a court where there are *no* facts to support the finding; and second, whether a hearing, denominated an "appeal," before a board, no member of which is selected by the aggrieved party, is an "arbitration," or an administrative appeal.

The District Court cites the "steel workers trilogy" (*United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 565; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; and *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593) as holding that "The Court would not be permitted to weigh the merits of the arbitration decision," and that therefore "the decision of the Joint Conference Board would be conclusive upon the issue here sought to be raised by the plaintiff."

The "steel workers trilogy" does not so hold.

In those cases, an attempt was made to have the Court decide the legality of the questions raised *before* they were submitted to arbitration. If the Joint Conference Board hearing was an arbitration, the arbitration has been completed. At this point then, whether the question was arbitrable is for the courts. See *Metal Products Workers v. Torrington*, 358 F.2d 103; *Local No. 490 v. Kirkhill Rubber Co.*, 367 F.2d 956. In other words, if an arbitrator arbitrarily makes a decision totally unsupported by facts, there can be judicial review and reversal.

The second question regards the effect of the Joint Conference Board hearing. Was it an arbitration? The

letter from the Union (Appendix, page 12) refers to the "right to appeal" to the Joint Conference Board, and the applicable portion of the contract (Article XXI, Section 3.) also speaks of "appeals." In the present case Totton thought he had to go before the Joint Conference Board before he could or should resort to the Court. The Joint Conference Board was selected, four by the Union and four by the Chattanooga Plumbing and Piping Contractors Association, Inc., and Totton was not a member of this Association.

The District Court decided this case on motion for summary judgment, without oral hearing, entirely on the basis of the admitted fact that the dispute was submitted to the Joint Conference Board. The factual dispute as to whether the submission was an appeal or an arbitration was decided adversely to Totton because of the wording of the contract; and the District Court then held that under the decision of this Court in the "steelworkers trilogy" no inquiry could be made into the legality of the results of the "arbitration."

CONCLUSION

It is earnestly urged that this Court remand the case to the District Court with instructions to hear the case on the merits. The statute [29 U.S.C. 185(a)] plainly gives jurisdiction, and there is no indication that this jurisdiction is subsidiary to that of a Joint Conference Board.

Otherwise, it would *never* be possible for a Court to review the legality of an arbitration. The "steelworkers trilogy" certainly laid down no such rule.

Respectfully submitted,

JOHN A. CHAMBLISS, JR.,
1111 Maclellan Building,
Chattanooga, Tennessee 37402,
Attorney for Petitioner.

SIZER CHAMBLISS,
400 Pioneer Building,
Chattanooga, Tennessee 37402,
Of Counsel

Appendix

[Caption Omitted]

COMPLAINT

(Filed July 1, 1966)

I.

This is a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce within the meaning of Section 301(a) of the Labor Management Relations Act, as amended (29 USC, Section 185(a)). Jurisdiction is based upon that Act, hereinafter called "the Act."

II.

Plaintiff is an individual, d/b/a Totton and Dunn Company, and is engaged in the plumbing business in and around Chattanooga, Tennessee. In his business he purchases, delivers and transports substantial quantities of materials in interstate commerce, and is engaged in an industry affecting commerce within the meaning of Section 2, Subdivision (7) of the Act.

III.

The defendant is an unincorporated association, and is a labor organization within the meaning of Section 2, Subdivision (5) of the Act.

IV.

The plaintiff and defendant are signatories to a contract known as the "Collective Bargaining Agreement between the Master Plumbers, Steamfitters and Piping Contractors and Local No. 43 of the United Association at Chattanooga,

Tennessee," a copy of which is attached to this complaint as Exhibit "A". The original signed copy is in the hands of the defendant.

V.

June 22, 1966, or shortly thereafter, the plaintiff received from the defendant a letter stating that plaintiff's contract was cancelled. A copy of this letter is attached hereto as Exhibit "B".

VI.

The plaintiff has not, and does not intend to, violate any of the terms of the contract (Exhibit "A" hereto); but believes that the defendant has violated and intends to continue violating the contract in that the defendant has refused, despite the wording of paragraph 6 of the contract (Exhibit "A") to furnish employees to the plaintiff upon request. Plaintiff presently needs about fifteen men, but the defendant will not furnish any men to plaintiff and would not even prior to its letter of June 22, 1966; at the same time insisting that the plaintiff cannot, under the terms of the contract, hire men, whether union members or not, who are not furnished by the defendant. The plaintiff, if he is unable to obtain men very soon, will be unable to complete a job he is now working on; and his business and reputation will be irreparably destroyed, and the defendant is aware of this fact.

Wherefore, the plaintiff prays the Court to declare the rights of the parties under the terms of the contract, Exhibit "A" hereto; to require the defendant to furnish employees to the plaintiff as required by the contract; to enjoin the defendant from violating the contract and particularly from picketing the jobs on which the plaintiff is

working, or in any way interfering with the plaintiff in his work; and prays for such other and further relief as to the Court may seem proper under the circumstances.

CHAMBLISS, CHAMBLISS & HODGE

BY .....
Jac Chambliss
1111 Maclellan Building
Chattanooga, Tennessee 37402
Attorneys for Plaintiff

EXHIBIT "A" TO COMPLAINT

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE MASTER PLUMBERS, STEAMFITTERS AND PIPING CONTRACTORS AND LOCAL UNION NO. 43 OF THE UNITED ASSOCIATION AT CHATTANOOGA, TENNESSEE.

* * *

ARTICLE XXI

JOINT CONFERENCE BOARD

Section 1: It is agreed that a Joint Conference Board shall be set up; this Board to consist of eight members: four selected by the Local Union and four selected by the Contractors.

Section 2: The Board shall select a Chairman and a Secretary-Treasurer, one office to be filled by a member of the contractors and one by a member from the Local Union. This Board shall handle all grievances that may arise between the Contractors and the Local Union (except jurisdictional disputes), and any other matter that may affect both organizations. They shall endeavor to improve employer-employee relationship and work together to the best interest of the pipefitting industry as a whole.

Section 3: Either the Union or Management may on its own initiative, submit grievances in writing for determination by the Board as provided for in this Article, and such Board shall meet promptly, but in no case more than seven calendar days following a request for its services to render a final and binding determination. Any decisions on appeals to the Board shall be in writing addressed to all parties interested in the grievance.

Section 4: No grievance shall be heard, considered or given recognition if it is more than ten days since the alleged infraction. Time limits may be waived by mutual agreement, but in no event will the Board be required to go retroactive of any claim of more than thirty days.

Section 5: Minutes shall be kept of all meetings a copy sent to each respective organization. Should at any time this committee disagree over the settlement of a grievance, they shall have the power to refer the matter to a Board of Arbitration. The Arbitration Board shall consist of three members. One member must be agreed upon by both organizations, one selected by the Contractors' Board members and one selected by Local Union Board members. The ruling of this Board shall be accepted as final and binding on both parties. The Arbitration Board shall have full power to establish their rules of procedure. This Board shall meet regularly on ..... day of each month.

Exhibit "B" to Complaint

EXHIBIT "B" TO COMPLAINT

UNITED ASSOCIATION
of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

[redacted]

LOCAL UNION 43 CITY Chattanooga STATE Tenn DATE June 22 19 66

Mr. J. A. Totten,
c/o Totten Plumbing & Heating Co
614 Frawley Road,
Chattanooga, Tenn. 37412

Dear Sir:-

This will advise you that as specified in Section 25 of our current agreement, your contract is cancelled.

Reasons are as follows:

1 - On May 27, 1966, Brother D. W. Killingsworth and I visited the Peavine Bapstist Church at Peavine, Georgia at 2:45 P. M. We found a plumber working on soil pipe who we did not know. In talking to him he said he was helping Brother Jim Dunn. Brother Dunn was not on the job.

On June 22, 1966, Brother Killingsworth visited a job at 3000 Rossville Blvd and found the same man running water pipe. On a second visit the same day, Brother Killingsworth visited the job and found two men working the same job, neither of whom he knew.

On June 22, 1966, I visited the job and at 11:20 found these two men pouring lead on the stack. At 12:40 P. M the same day, I came back by and talked to one of the men and asked him if he had City plumbing license. He stated he did not, he was not doing any plumbing and asked me if I was a City Inspector.

Section 6 of our agreement specifies that The Business Manager of the Union shall furnish, upon request of the employer, all employees to the employers under outlined conditions.

Exhibit "B" to Complaint

UNITED ASSOCIATION
of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

[redacted]

LOCAL UNION 43, CITY Chattanooga, STATE Tenn, DATE June 22, 19[redacted]

-2-

Therefore, by working people who are not furnished by the Local (whether or not they are Union members) it is my opinion that you have violated your agreement.

Under the agreement you have the right to appeal to the Joint Conference Board (Section 21) within 10 days in writing.

Sincerely

C. Earle Williams
Business Manager
Plumbers & Steamfitters Local #43

[Caption Omitted]

ANSWER

(Filed July 21, 1966)

Now comes Local 43 of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and for answer to the complaint says:

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

Now answering the specific paragraphs of the complaint this defendant says:

The allegations contained in paragraph I that the parties are engaged in commerce within the meaning of Sec. 30(a) of the Labor Management Relations Act As Amended, are admitted.

It is denied that jurisdiction is conferred upon the Court by virtue of the allegations contained in said complaint.

The allegations of paragraph II regarding commerce within the meaning of the Act are admitted.

It is admitted that the defendant is an unincorporated labor organization within the meaning of the Act.

The allegations of paragraph IV that the parties are signatories to the collective bargaining agreement which is attached to the complaint are admitted.

The allegations that the plaintiff received a letter from the defendant stating that the contract was cancelled is admitted.

The allegations of paragraph VI are denied.

THIRD DEFENSE

The Court lacks jurisdiction of the claim for the reason that the collective bargaining agreement provides for arbitration of all disputes, as appears at Article XXI, page 15 of said Agreement. Plaintiff elected the Joint Conference Board, the arbitration tribunal chosen by the parties, to act upon the matter. A hearing was held on the night of June 30, 1966, and said Joint Conference Board decided against plaintiff and in favor of defendant. The affidavit of H. D. Pickett, containing the minutes of said Joint Conference Board meeting, are hereby adopted and made a part of this Answer. The claim set forth by the plaintiff in this action has been previously adjudicated and determined by the Arbitration Tribunal, and the matters alleged herein are res judicata.

FOURTH DEFENSE

The Court has no jurisdiction to declare the rights of the parties or enjoin defendant, particularly since the facts outlined in the complaint do not constitute a violation of the Labor Management Relations Act, As Amended.

FIFTH DEFENSE

The complaint fails to state a cause of action for the reason that the matters of which complaint is made have been preempted into the National Labor Relations Board which has exclusive jurisdiction of all hiring hall complaints.

WHEREFORE this defendant demands that the complaint against it be dismissed and that this defendant recover its costs herein expended.

KING & FUSTON
Attorneys for Defendant

By .....
723 Chattanooga Bank Bldg.,
Chattanooga, Tennessee 37402

[Certificate of Service Omitted]

[Caption Omitted]

MOTION TO DISMISS COMPLAINT OR FOR SUMMARY JUDGMENT

(Filed July 21, 1966)

The defendant moves the Court as follows:

I

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

II

To dismiss the action because the claim set forth by the plaintiff in the action against defendant for the reason

that the same claim as that set forth in plaintiff's complaint herein has been previously adjudicated and determined by the Arbitration Tribunal selected by the parties, as more precisely appears from the affidavits hereto attached.

III

In the alternative defendant moves the Court for summary judgment for defendant under Rule No. 56, Rules of Civil Procedure, on the ground that there is no genuine issue as to any material facts, as more precisely appears from the affidavits attached hereto.

The affidavits of C. Earle Williams, W. D. Killingsworth and H. D. Pickett are attached hereto and made a part of this Motion.

KING & FUSTON
Attorneys for Defendant

By .....
723 Chattanooga Bank Bldg.,
Chattanooga, Tennessee

Exhibit "C"

ASSOCIATED MECHANICAL CONTRACTORS
OF CHATTANOOGA, TENNESSEE, INC.
P. O. Box 387, 902 McCallie Avenue
Chattanooga, Tennessee 37401

July 1, 1966

Mr. James A. Totten
614 Frawley Road
Chattanooga, Tennessee

Dear Mr. Totten:

I have been instructed by the Joint Conference Board to inform you of the decision made on your appeal dated June 20, 1966, in regard to action taken by Local Union #43 in the cancellation of your current labor contract as provided for in Article XXI of the current Agreement.

In view of the evidence presented, the Joint Conference Board concurs in the action taken by the local union in cancelling your contract with Local Union #43, and this correspondence is addressed to you in compliance with Article XXI, Section 3, of the current Agreement.

Very truly yours,

/s/ H. D. Pickett
H. D. Pickett, Secretary
Joint Conference Board

HDP/jl

cc: Mr. C. Earl Williams
Plumbers & Steamfitters Local #43
540 Vine Street
Chattanooga, Tennessee

[Caption Omitted]

OPINION

(Filed December 13, 1966)

This is an action for alleged breach of a collective bargaining agreement. The complaint alleges that the plaintiff, an individual doing business as Totton and Dunn Company, is a party to a collective bargaining agreement with the defendant, Local Union No. 43, an unincorporated labor organization. The complaint alleges that the plaintiff has at all times complied with the collective bargaining agreement, but that nevertheless upon June 22, 1966, the defendant wrongfully notified the plaintiff that the contract was being cancelled as of that date. The plaintiff seeks a mandatory injunction to require the defendant to comply with the complaint and relies upon Section 301(a) [29 U.S.C. 185(a)] of the Labor-Management Relations Act as a basis for the Court having jurisdiction to grant the relief prayed.

The defendant in its answer denies that it wrongfully terminated the collective bargaining agreement and further contends that the issue of termination has been heretofore fully adjudicated by an arbitration decision in favor of the defendant's right to terminate the contract. The defendant further contends that exclusive jurisdiction of this action would lie with the National Labor Relations Board.

The defendant has now filed a motion to dismiss and in the alternate for a summary judgment. Taking up first the motion to dismiss, it appears upon the face of the complaint that the plaintiff has alleged a cause of action within the jurisdiction of this Court. The complaint

contains no allegations with respect to any arbitration of the matters presently in dispute. Accordingly, the motion to dismiss should be denied.

Turning next to the defendant's motion for summary judgment, defendant has filed an affidavit by the Business Agent of Local Union 43 wherein it is stated that the plaintiff made a written request for the Joint Conference Board to decide the issue with regard to the Union's right to terminate the contract at the time that the plaintiff received the notice of cancellation. The affiant further states that the submission to the Joint Conference Board was in accordance with Article XXI of the collective bargaining agreement and that the Joint Conference Board did in fact hold a hearing and thereafter unanimously uphold the action of the Union in terminating the plaintiff's contract. A copy of the minutes of the Joint Conference Board meeting, held June 30, 1966, is filed as an exhibit along with a copy of the notice given the plaintiff by the Secretary of the Joint Conference Board advising the plaintiff that the Board had concurred in the action of the Union in cancelling the plaintiff's contract.

No counter-affidavits have been filed. Accordingly, there appears to be no genuine issue of fact but that the dispute between the plaintiff and defendant over the termination of the contract was submitted to the Joint Conference Board as provided in Article XXI of the contract and that the Joint Conference Board decided the issue in favor of the Union. The plaintiff, by way of response to the defendant's motion, takes the position that under the language of the contract, submission of the dispute to the Joint Conference Board and the decision of that Board did not constitute a binding arbitration but rather amounted only to the exhaustion of administrative remedies prior to resort to Court.

Article XXI provides as follows:

"Section 1: It is agreed that a Joint Conference Board shall be set up; this Board to consist of eight members: four selected by the Local Union and four selected by the Contractors.

Section 2: The Board shall select a Chairman and a Secretary-Treasurer, one office to be filled by a member of the contractors and one by a member from the Local Union. This Board shall handle all grievances that may arise between the Contractors and the Local Union (except jurisdictional disputes), and any other matter that may affect both organizations. They shall endeavor to improve employer-employee relationship and work together to the best interest of the pipefitting industry as a whole.

Section 3: Either the Union or Management may on its own initiative, submit grievances in writing for determination by the Board as provided for in this Article, and such Board shall meet promptly, but in no case more than seven calendar days following a request for its services to render a final and binding determination. Any decisions on appeals to the Board shall be in writing addressed to all parties interested in the grievance.

Section 4: No grievance shall be heard, considered or given recognition if it is more than ten days since the alleged infraction. Time limits may be waived by mutual agreement, but in no event will the Board be required to go retroactive of any claim of more than thirty days.

Section 5: Minutes shall be kept of all meetings a copy sent to each respective organization. Should at any

time this committee disagree over the settlement of a grievance, they shall have the power to refer the matter to a Board of Arbitration. The Arbitration Board shall consist of three members. One member must be agreed upon by both organizations, one selected by the Contractors' Board members and one selected by Local Union Board members. The ruling of this Board shall be accepted as final and binding on both parties. The Arbitration Board shall have full power to establish their rules of procedure. This Board shall meet regularly on ..... day of each month."

It appears unto the Court that the foregoing language of the contract does provide for binding arbitration of all grievances other than jurisdictional disputes. In the case of United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S .574, 4 L.ed.2d 1409, 80 S.Ct. 1347, the Supreme Court held that provisions for compulsory arbitration of disputes arising under collective bargaining agreements are to be liberally construed in favor of such arbitration and that the hostility sometimes shown compulsory arbitration agreements in commercial contracts has no place in the field of labor relations. The Court went on to state:

"In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

Moreover, as held in the steel workers trilogy, the Court would not be permitted to weigh the merits of the arbitration decision. United Steelworkers of America

v. American Mfg. Co., 363 U.S. 565, 4 L.ed.2d 1403, 80 S.Ct. 1343; United Steel Workers v. Warrior & Gulf Navigation Co., supra; and United Steel Workers v. Enterprise Corp., 363 U.S. 593, 4 L.ed.2d 1424, 80 S.Ct. 358.

There is no issue of fact in this record but that the very matter here sought to be litigated by the plaintiff, that is, the propriety of the Union's action in terminating the collective bargaining agreement, was submitted by the parties to the Joint Conference Board in accordance with Article XXI of the contract. There is no dispute in the record but that the Joint Conference Board decided the issue in favor of the Union's right to terminate the contract. Under the language of the contract the Court is of the opinion that the decision of the Joint Conference Board would be conclusive upon the issue here sought to be raised by the plaintiff.

The defendant's motion for summary judgment will accordingly be sustained and an order will enter dismissing this suit.

Frank W. Wilson
United States District Judge

[Caption Omitted]

ORDER

(Filed December 13, 1966)

This case is before the Court upon the defendant's motion for summary judgment. For the reasons set forth in an opinion filed this date, the Court is of the opinion that the motion for summary judgment should be sustained and that the plaintiff's action should accordingly be dismissed.

It is accordingly ORDERED that the plaintiff's suit be and hereby is dismissed at the cost of the plaintiff.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

[Caption Omitted]

MOTION TO RECONSIDER

(Filed December 22, 1966)

Plaintiff moves the Court to reconsider its Opinion filed December 13, 1966, for the reasons set out in the attached brief.

CHAMBLISS, CHAMBLISS & HODGE

By Jac Chambliss
Attorneys for Plaintiff

[Certificate of Service Omitted]

[Caption Omitted]

ORDER

(Filed January 19, 1967)

This case comes before the Court again upon the motion of plaintiff for the Court to reconsider its prior ruling sustaining defendant's motion for summary judgment and dismissing plaintiff's action.

The Court, having considered the motion and the briefs and arguments of the parties, is of the opinion that its prior ruling is correct and it is accordingly ORDERED that plaintiff's motion be denied.

APPROVED FOR ENTRY.

.....
United States District Judge

No. 17,778

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES A. TOTTON d/b/a TOTTON AND DUNN COMPANY,

Plaintiff-Appellant,

v.

LOCAL 43 OF UNITED ASSOCIATION OF JOURNEYMEN, ETC.,

Defendant-Appellee.

ORDER

FILED
May 9, 1968
CARL W. REUSS, Clerk

Before: WEICK, Chief Judge, McCREE and COMBS, Circuit Judges.

The company has appealed from a judgment of the District Court holding that the language of a collective bargaining agreement provided for binding arbitration of all grievances except jurisdictional disputes. The parties had submitted to a joint conference board the question whether the union had a right to cancel the collective bargaining agreement on the ground that the employer had violated its provisions. The joint conference board found in favor of the union and the District Judge held the company was bound by the decision.

Upon consideration, the judgment of the District Court is affirmed for the reasons stated in the District Judge's memorandum opinion.

Entered by order of the Court

/s/ Carl W. Reuss
Clerk

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IN THE

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OCTOBER TERM, 1967

NO. 374

JAMES A. TOTTEN,
d/b/a TOTTEN AND DUNN COMPANY,
Petitioner,

v.

LOCAL 43 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

S. DEL FUSTON,
507 Maclellan Building,
Chattanooga, Tenn., 37402,

Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. .....

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INDUSTRY OF THE UNITED STATES
AND CANADA,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

May it please the Court:

The petitioner has correctly referred to the opinion below and no question is raised concerning jurisdiction.

QUESTION PRESENTED

We disagree with the question presented as phrased by the petitioner. In the Sixth Circuit the petitioner, then appellant, raised four questions. The one that most closely resembles the present proposed question was as follows:

CAN A DISTRICT COURT, AFTER A MATTER HAS BEEN SUBMITTED TO ARBITRATION, DETERMINE WHETHER THE CONCLUSIONS OF THE ARBITRATION IS LEGAL OR ILLEGAL?

Petitioner contended the District Court answered this question "No". In the brief of the respondent, then appellee, we agreed with that question but contended that the District Court answered the question, "Yes".

The principal question before the District Court and Court of Appeals was as follows:

CAN THE DISTRICT COURT ENFORCE THE AWARD OF AN ARBITRATION TRIBUNAL UNDER THE FOLLOWING CONDITIONS?

(a) THE CONTRACT PROVIDES THE EXCLUSIVE REFERRAL OF ALL EMPLOYEES SHALL BE FROM THE UNION HIRING HALL (WHETHER UNION OR NON-UNION) ON A NON-DISCRIMINATORY BASIS;

(b) THE EMPLOYER VIOLATES SAID CONTRACT BY HIRING NON-UNION EMPLOYEES WITHOUT CLEARANCE THROUGH THE HIRING HALL AND WITHOUT NOTIFYING THE UNION;

(c) WHEN THE EMPLOYER IS APPREHENDED THE UNION CANCELS THE CONTRACT UNDER A SECTION PROVIDING FOR CANCELLATION IN THE EVENT THE EMPLOYER VIOLATES SAID CONTRACT, AND

(d) THE EMPLOYER INVOKES THE GRIEVANCE PROCEDURE WHEREUPON AFTER AN IMPARTIAL HEARING THE ARBITRATION TRIBUNAL UNANIMOUSLY DECIDES AGAINST THE EMPLOYER AND AFFIRMS THE ACTION OF THE UNION.

THE DISTRICT ANSWERED THIS QUESTION "YES".

THE RESPONDENT CONTENDS THE DISTRICT COURT AND COURT OF APPEALS WAS CORRECT IN ANSWERING THIS QUESTION "YES".

STATEMENT OF THE CASE

To clarify the petitioner's statement of the case, the following facts are submitted:

The Collective Bargaining Agreement (6a) under Article VI (10a) states at Section 1 that applications for jobs shall be on a non-discriminatory basis, and shall not be based on, or in any way affected by...union membership. The agreement incorporates the Hiring Hall Plan (42a). The Hiring Hall Plan provides in Section 2 that the exclusive hiring of employees shall be through the Union. Section 5 provides that referrals shall be on a non-discriminatory basis - without regard to union membership. (44a, 45a)

The referral system under the Collective Bargaining Agreement follows a model plan suggested and advocated by the National Labor Relations Board. (Affidavit of C. Earle Williams. 38a) "Union Hiring Halls" an address by NLRB General Counsel Jerome D. Fenton, 42 LRRM 101, "Reasoning Behind NLRB's Hiring-Hall Standards". An address by NLRB member Joseph Alton Jenkins, 44 LRRM 71.

The Union could have no objection to any employer securing non-union plumbers so long as they were cleared through the Hiring Hall. (Affidavit of C. Earle Williams, last paragraph at 40a). Most important to the Union was that all plumbers be cleared through the Hiring Hall as this would be the only means the Union would have of policing the Contract; viz., knowing who was working and then checking to establish if the employer was paying the agreed scale and especially the fringe benefits. (Affidavit of C. Earle Williams, 38a to 40a).

The contention of the Union was that the employer was not clearing its non-union men through the Hiring Hall for the specific purpose of avoiding payment of the agreed scale and fringe benefits under the Collective Bargaining Agreement. (39a, 40a). Accordingly, the Union cancelled the contract in accordance with Article XXV (30a). The action of the Union immediately precipitated the action of the employer in invoking the arbitration procedure by written application to the Joint

Conference Board in accordance with Article XXI of the Agreement, (26a).

A hearing was duly held and a unanimous decision of the Arbitration Tribunal was against the employer and in favor of the Union (59a).

The Joint Conference Board kept detailed minutes of the hearing, including a narrative transcript of the evidence and the reasons for its findings. (59a).

ARGUMENT

The District Court obviously inquired into the question of arbitrability and found no grounds to reverse the decision of the Joint Board. The petitioner is unhappy with the award because the Board failed to find in his favor.

The petitioner questions whether or not the hearing before the Joint Board was an Arbitration. Apparently the petitioner feels the words "right to appeal" negates an Arbitration hearing.

Black's Law Dictionary defines "appeal" as follows:

> " 'Appeal' has no conclusive meaning, and it is necessary in each instance to look to the particular act giving an appeal, to determine powers to be exer-

cised by the appellate court. *McCauley v. Imperial Woolen Co.*, 261 Pa. 312, 104 A 617, 620.

"An 'appeal' in equity is a trial de novo. *Simmons v. Stern* (C.C.A.) 9 F (2d) 256, 259.

" 'Appeal" may also be used to denote the act of invoking another judicial forum for the trial. *Newell v. Kalamazoo Circuit Judge*, 215 Mich. 153, 183 N.W. 907, 908. See appealed. As used in statutes authorizing taxpayers or parties to condemnation proceedings to appeal, the term often has its non-technical sense meaning to 'apply for' or 'ask'. " (Citing Cases)

The parties simply used the term "right to appeal" in the Contract as meaning to denote the act of invoking the arbitration hearing.

In any event, the question of the type of arbitration invoked herein has been settled by this Court in the case of *General Drivers v. Riss & Co.*, 372 U.S. 517, wherein it was held:

"It is not enough that the word 'arbitration' does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act 'can be effectuated only if the means chosen by the parties for the settle-

ment of their differences under a collective bargaining agreement is given full play'. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement it is enforceable under Section 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566, 567-578, 46 LRRM 2414; cf. *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 49 LRRM 2670".

In the present case the parties negotiated a comprehensive agreement. They chose a "Joint Conference Board" to settle their disputes. The ambit of this Joint Conference Board, Article XXI, is all inclusive and provides as follows:

"This Board shall handle all grievances as they arise between the contractors and the Local Union (except jurisdictional disputes) and any other matter that may affect both organizations". (Underscoring ours)

The District Court, after reviewing the undisputed facts, stated in its Opinion as follows:

"No counter-affidavits have been filed.

> Accordingly, there appears to be no genuine issue of fact but that the dispute between the plaintiff and defendant on the termination of the Contract was submitted to the Joint Conference Board as provided in Article XXI of the Contract and that the Joint Conference Board decided the issue in favor of the Union".

The Court then held under the Steel Workers triology, the Court would not be permitted to weigh the merits of the Arbitration Decision, citing the following cases:

> *United Steel Workers of America vs. American Mfg. Co.*, 363 U.S. 565;
>
> *United Steel Workers vs. Warrior & Gulf Navigation Co.*, 363 U.S. 574;
>
> *United Steel Workers vs. Enterprise Corp.*, 363 U.S. 593.

CONCLUSION

The respondent contends that the District Court and the Court of Appeals for the Sixth Circuit were correct in their decisions. Petitioner's contentions were also submitted to the Tenth Region of the National Labor Relations Board, which found against him. Respondent then appealed to the General Counsel of the National Labor Relations Board,

who found no violation of the National Labor Relations Act, as amended. The decision of the General Counsel is attached hereto (Appendix, Page 1b).

Based upon the foregoing decisions and the reasons contained herein the respondent respectfully insists that the petition should be denied.

S. DEL FUSTON
507 Maclellan Building
Chattanooga, Tennessee 37402

Attorney for the Respondent

NATIONAL LABOR RELATIONS BOARD
Office of the General Counsel

Washington D.C. 20570

December 6, 1966

Re: Plumbers & Steamfitters Local No. 43
(Totten & Dunn)
Case No. 10-CB-1632; 10-CB-1632-2

William G. Haemmel, Esq.
Humphreys and Hutcheson
Maclellan Building
Chattanooga, Tennessee 37402

Dear Mr.Haemmel:

Your appeal from the Regional Director's refusal to issue complaint in the captioned case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. Under all the circumstances, the burden of establishing that the Union had caused or attempted to cause the Company to discriminate against employees Simpson and Tudor could not be sustained. In view of the evidence that other contractors employed nonunion employees without objection from the Union, that such contractors cleared such hirings through the hiring hall in accordance with the prevailing practice under the exclusive hiring agreement and that there apparently were no unemployed plumbers for

whom the Union was seeking to create work opportunities, and as there was no evidence that the Union, in its several visits to Company jobsites,made any effort to induce the Company to get rid of these employees, the incident of June 21 at the Union hall, wherein the Union is alleged to have made some reference to the "nonunion" status of such employees, was deemed to provide insufficient basis, standing alone, for an unfair labor practice finding. In these circumstances, and in view of the Company's failure to make the welfare payments and meet the wage scale required thereunder, the Union's cancellation of its contract with the Company was not deemed to constitute an attempt to cause discrimination within the meaning of Section 8(b)(2) of the Act.

Arnold Ordman
General Counsel

By /s/ Irving M. Herman
Director, Office of
Appeals

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 374

JAMES A. TOTTON, d/b/a
TOTTON AND DUNN COMPANY,
Petitioner,

v.

LOCAL 43 OF UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY
OF THE UNITED STATES AND CANADA,
Respondents.

MOTION TO EXTEND TIME

MOTION TO REHEAR

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OF THE UNITED STATES AND CANADA,
Respondent.

MOTION TO EXTEND TIME

James A. Totton, petitioner in No. 374, October Term, 1968, moves the Court to extend the time within which a petition to rehear may be filed, and to permit the filing of said petition to rehear, in said matter, for the reasons appearing in said petition.

PETITION TO REHEAR

James A. Totton, petitioner in No. 374, October Term, 1968, which petition was denied on October 21, 1968, prays the Court to rehear said petition and remand the case for

consideration in light of the decision in *Commonwealth Coating Corp. v. Continental Casualty Co., et al*, No. 14, October Term 1968, decided November 18, 1968.

The grounds for this petition to rehear are:

In *Commonwealth Coating Corp. v. Continental Casualty Co.* this Court indicated that court review of an arbitration award was not impossible, and reversed an arbitration board award because of possible prejudice on the part of a member of the board.

In the Totton petition the District Court and Court of Appeals for the Sixth Circuit held that since the question raised by the plaintiff Totton had been submitted to the Joint Conference Board—no member of which was picked by the plaintiff, but half was selected by the Union and half by the Contractors Association, of which the plaintiff was not a member—the decision of the Joint Conference Board "would be conclusive," and no Court review was possible. The Court held that *no* question either of prejudice of the Joint Conference Board or of legality of its decision could be raised.

Respectfully submitted,

.....

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Of Counsel.

This is to certify that the above petition to rehear is presented in good faith and not for delay, and is presented only because the intervening decision of this Court indicates that review of an arbitration for legality is possible.

.....

JOHN A. CHAMBLISS, JR.